& Co. to reduce the draft," does not seem consonant with the recital of the facts in the first part of the opinion. It was there stated the Hornung wired Syer & Co. to draw on him for the depreciation, not to reduce the amount of the draft already sent forward by the Greensburg bank, and the very fact that he did so, seems to indicate strongly that he recognized that he had parted with all right to control the other draft, and adopted this method of making allowance for the depreciation, i. e., through a new transaction independant of the other draft and what had been already done in relation thereto.

He did not attempt to interfere with the first draft, probably because he recognized that he had no control over the subject, thereby making the just inference the opposite of that stated by the court here.

The effect attributed to the waiver of protest and notice by the forwarding bank seems to have been the same in each case, i. e., to leave it as an element to be weighed by the jury. It was not inconsistent with the ownership by the forwarding bank of the draft.

J. F. M.

CITY OF RADFORD *v.* CLARK.

(Richmond, January 25, 1912.)

1. Municipal Corporations—Tort of Agents or Employees—Liability.—In order to render a municipal corporation liable in damages for the torts of its agents and employees, it is necessary, among other things, that the injury complained of be caused by, or result from, an act done in the exercise of some power conferred upon it by its charter or other positive enactment.

2. Idem—Operation of Quarry—Ultra Vires—Liability for Injury.—Though it may be convenient or even profitable for a municipal corporation, in order to perform certain duties imposed upon it, to own and operate a rock quarry, it has no power to do so unless that power is in express words conferred in its charter or necessarily or fairly implied in or incidental to the powers expressly granted; and where the power is not so conferred there is no liability upon the municipality for a tort committed by its agents or servants while operating such a quarry, whether within or outside of the corporate limits.

3. Idem—Defect in Highway—Public Nuisance—Noises Outside Limits of Highway.—Noises outside the limits of a highway, amounting to a public nuisance, are not a defect in the highway, and a municipal corporation cannot be held liable for failure to prevent such a nuisance.

Error to Circuit Court of Montgomery county. Reversed.

Harless & Colhoun and *H. C. Tyler,* for the plaintiff in error.
Longley & Jordan, for the defendant in error.

CARDWELL, J.: The declaration in this action, brought by Mrs. Mollie P. Clark against the city of Radford, consists of five counts, which, after setting out that the defendant is a municipal corporation chartered by the legislature of Virginia, and charged with the duty of keeping its streets in a reasonably safe condition for use of the public, alleges that said defendant city was on the .... day of September, 1909, through its servants and agents, blasting with powder and other explosive material in, and getting out rock for use on its streets from, a rock quarry, at a distance of sixty-five feet from a street of the city known as Grove Avenue, and that while the city was so engaged in blasting, on the date named, the plaintiff was driving along said street and within seventy-five feet of the point of the blasting, and without knowledge thereof on her part, when a succession of blasts were set off, frightening her horse, causing it to become unmanageable and suddenly to wheel around in the street, throwing plaintiff violently upon the ground, whereby she was seriously injured and her buggy and harness destroyed.

The neglect of the city to perform its duty of keeping its streets, and particularly Grove Avenue, in reasonably safe condition for the use of travelers thereon is alleged in the five counts in plaintiff's declaration as follows: The first count charges a failure to give warning of its intention to put off the blasts; the second charges a failure on the part of the city to cover its blasts; the third charges the employment by the city of unskillful, careless and negligent servants; the fourth merely alleges damages to the buggy and harness; and the fifth combines the negligence alleged in the first, second and third counts, and practically charges negligence on the part of the city in maintaining or failing to prevent a nuisance, resulting in injury to the plaintiff.

The defendant city demurred, in writing, to the declaration and each count thereof, which demurrer was by the court overruled, whereupon the plea of not guilty was entered and issue joined; and at a subsequent term of the court a trial by jury was had, resulting in a verdict and judgment against the city for $500 damages in favor of the plaintiff with interest and costs, to which judgment this writ of error was awarded.

Of the eight assignments of error, we find it necessary to consider only the first, which is to the ruling of the court upon the demurrer to the declaration.

"In order to render a municipal corporation liable in damages for the torts of its agents and employees, it is necessary, among other things, that the injury complained of be caused by, or result from an act done in the exercise of some power conferred upon it by its charter or other positive enactment." Duncan *v.* City of Lynchburg, 2 Va. Dec. 700; Donable's Admr. *v.* Town

of Harrisonburg, 104 Va. 533, and authorities cited in those cases.

In the first of the cases just cited the opinion by Buchanan, J., defines what powers, under the settled law, a municipal corporation can exercise and none other, and it was there held that the city of Lynchburg, either under its charter provisions or the general law relating to such corporations, had no power or authority to create and maintain a nuisance resulting from the operation of a rock quarry outside of the city's limits, although the rock quarried was for use in the construction and maintenance of roads which the city was authorized to construct and maintain, the nuisance complained of having been created and continued by the agents or employees of the city while engaged in a work which was without its corporate powers.

In Donable *v.* Harrisonburg, *supra,* the injury sued for resulted from the operation of a rock quarry outside of the corporate limits of the town, the stone gotten out to be for use upon the streets of the town; but it was there also held, that there could be no recovery for the injury, because the operation of the rock quarry was *ultra vires,* for the reasons—(1) that neither the charter nor the general law gave the town authority to operate a rock quarry; and (2) because the operation of the quarry was carried on outside of the corporate limits.

It has been repeated in the authorities, that it might be convenient and even profitable for a municipal corporation, in order to perform certain duties imposed upon it as such corporation to own and operate a rock quarry or other like undertakings, yet it has no power to do so unless in express words conferred in its charter or necessarily or fairly implied in or incidental to the powers expressly granted.

In this case, as in Duncan *v.* Lynchburg, and Donable *v.* Harrisonburg, *supra,* to operate a rock quarry was neither necessary, fairly implied in, nor incident to the duty of the city of keeping its streets in a reasonably safe condition, nor essential to the declared objects and purposes of the corporation. We fail to see how a different rule of law is to be applied where the injury sued for resulted from an unauthorized act of a municipality, done within its corporate limits, from that applied by this and other courts, as well as sanctioned by the ablest law writers, to cases in which the tort was committed outside of the corporate limits, for the tort committed either in the one or the other case flows from an *ultra vires* act.

Neither the charter of plaintiff in error, city of Radford, nor the general laws of the State authorize the operation, either within or without its corporate limits, of a rock quarry.

It is contended for defendant in error, that although there

is no allegation or complaint made in her declaration that the street on which she received her injuries was unsafe by any defect therein, she is nevertheless entitled to recover for her injuries because the street was made unsafe by the operation of the rock quarry located sixty-five feet therefrom.

The authorities very generally hold that noises outside of the limits of the highway, amounting to a public nuisance, are not a defect in the highway.

The allegation was made in the case of Lincoln *v.* City of Boston, 148 Mass. 578, 20 N. E. 329, that on the day of the accident to the plaintiff cannon were fired in Boston common, near Charles street, which rendered said street, on which plaintiff was driving, unsafe, and was a public nuisance; that the common was owned and controlled by the city, upon which, by the mayor acting as its agent, the firing of the cannon was licensed; but the opinion of the court sustaining the demurrer to the declaration said: "Annoying and even dangerous as such firing may be, an adjoining householder could not maintain an action against the city, and the plaintiff stands no better than an adjoining owner would."

To the same effect is the opinion of the Supreme Court of Wisconsin in Hubbell *v.* City of Virogue, 30 N. W. 847, where the action was to recover damages for an injury received while passing along one of the streets of the city, caused by a ball of a gun fired from within a shooting gallery adjoining the sidewalk, but not within the boundaries of the street or sidewalk, the declaration charging that the operating of the shooting gallery, which was licensed by the city, was an obstruction to the free and safe travel of the public on and along a street. In the opinion of the court holding the city not liable, it is said: "The shooting gallery was neither in the street, nor within the boundaries of the sidewalk, but outside of the same, upon private property, and no more obstructed the sidewalk than any other building adjoining such walk."

In the case just cited, as in the case before us, the contention was made that the city was liable because it knowingly permitted a public nuisance to exist in the city adjacent to a public street, which endangered persons traveling upon the street; but with respect to this contention the court's opinion says: "An action will not lie against a municipal corporation for not suppressing a public nuisance within the municipality when such nuisance is not created nor maintained by the expressed authority of the municipality, and when such public nuisance is not the result of some act done, or neglected to be done, in the performance of a duty imposed upon the municipality by law, such as repair of streets, constructing sewers, water or other public works, the

municipal corporation is not liable for injuries caused to persons or property of the citizen by the criminal acts of individuals, unless made liable by statute."

The further contentions of the learned counsel in this case, that plaintiff in error is liable "for maintaining and not preventing a nuisance, resulting in injury to plaintiff," is equally without merit. Leaving out of the view the fact that there is no allegation in the declaration, or in any count thereof, that plaintiff in error had knowledge, actual or constructive, of the unsafe condition of its streets, the operation or control of a rock quarry and blasting therein situated sixty-five feet or more from the street upon which defendant in error received her injuries, was not a positive or ministerial duty, but a governmental, legislative and discretionary duty for which the city (plaintiff in error) cannct be held liable. Jones *v.* Williamsburg, 97 Va. 722, and authorities cited.

Conceding that the operation of the rock quarry complained of in this case was a nuisance, plaintiff in error created it without power or authority conferred upon it by its charter or other positive enactment, and it follows that it could not be held liable for not preventing the nuisance, since the alleged nuisance (the rock quarry) was sixty-five feet or more from the street and not connected in any way with the physical construction of the street.

An examination of the cases cited for defendant in error discloses that they all practically deal with the question of a nuisance per se, such as the obstruction of the street itself by the erection of objects therein, as in City of Richmond *v.* Smith, 101 Va. 161, and in like cases, or the carrying on of a dangerous business that no amount of care, reasonable foresight or prudence could have safeguarded against, as were the facts appearing in Wilson *v.* Phœnix Power Co., 21 S. E. 1026. Neither those cases nor the line of cases to which they respectively belong apply to the facts alleged in the declaration in this case.

The authorities cited above hold, (1) that a city is not liable for its failure to pass ordinances prohibiting bicycle riding upon sidewalks, or coasting upon its streets (Jones *v.* Williamsburg, *supra*), or (2) the firing of cannon near a street, or (3) the firing of a gun in a shooting gallery licensed by the city to operate adjacent to and outside of a street, resulting in injury to a traveler upon the street; and it follows, necessarily, that a city cannot be held liable for its failure to pass an ordinance to prevent or safeguard the firing of blasts in a rock quarry sixty-five feet or more from its streets and upon private property. See also Farrell *v.* Inhabitants, &c., 69 Me. 72, and cases cited.

For these reasons we are of opinion that the demurrer to the

declaration and each count thereof should have been sustained, and in view of the fact that it is to be presumed that defendant in error has made the strongest presentation of her case which the facts permit, and that it could not be bettered if leave were given to amend, this court, entering such judgment as the circuit court ought to have rendered, will sustain the demurrer and enter a final judgment for plaintiff in error.

WHITTLE, J. (dissenting): The following material facts are set out in the declaration: While the defendant in error, Mrs. Mollie P. Clark, was driving in her buggy along one of the streets of Radford, the employees of the city, without notice or warning of any kind, set off three uncovered blasts in a rock quarry operated by the city for the purpose of obtaining material with which to repair the streets. The quarry was situated inside the corporate limits and within sixty-five feet of the street, and was seventy-five feet from the point of accident. The noise from the explosions, together with the falling rocks in the street and upon the vehicle, frightened the horse and caused it suddenly to turn and run away, overturning the buggy and inflicting upon the plaintiff the injuries of which she complains.

These allegations were proved at the trial, and thereupon the jury awarded the plaintiff $500 damages.

Upon the theory that the act of the city in thus operating the rock quarry was an *ultra vires* act, for which the municipality could not be held liable in damages, this court reversed the judgment of the trial court and sustained the demurrer to the declaration.

In the two Virginia cases (Duncan *v.* City of Lynchburg, 2 Va. Dec. 700, and Donable *v.* Harrisonburg, 104 Va. 533), relied on, in part, to sustain this ruling, the rock quarries in question were both located outside the city limits, which fact seems to have exercised considerable influence with the court.

The charter of Radford and the general law impose upon the city the imperative duty of keeping its streets in reasonable repair; and I should be loath to hold that such grant of power and imposition of responsibility does not carry with it as a necessary and fairly to be implied incident the power to take rock and other needful material from its contiguous property to enable the city to discharge that duty. It is matter of common knowledge that cities and towns throughout the country resort to such sources of supply in opening, grading and repairing streets, and to deny them that privilege would in many instances occasion intolerable inconvenience and expense.

But I think the action is maintainable on another ground. The conceded duty which rests upon all municipalities to keep

their streets in reasonably safe condition would be but half discharged were they permitted to suffer dangerous operations to be so negligently conducted in the immediate vicinity of such streets as to jeopardize the safety of the traveling public along the same. Such works as imperil human life and safety are classified as public nuisances. And in City of Richmond *v.* Smith, 101 Va. 161, it was held: "If a city, without legislative authority, authorizes the erection of a nuisance in one of its streets, it is liable in damages for the injuries resulting therefrom. The city cannot escape liability merely because it exceeded its powers in authorizing the nuisance."

Blasting, it is true, is not *per se* a nuisance; but blasting near a highway or street becomes a nuisance when it is conducted in such a manner as to endanger the safety of travelers along such highway or street. City of Paris *v.* Com'th (Ky.), 93 S. W. 907.

In 28 Cyc., 1292, n. 38, the reason for the rule is stated thus: "Nuisances in or near public street—In general.—The doctrine of the liability of a municipality for failure to abate a nuisance in or near a public street arises out of the rule enforced in those jurisdictions, that a municipal corporation is bound to keep its streets and sidewalks in a reasonably safe condition, and that failure to perform this duty constitutes a breach of ministerial duty, and the liability does not rest upon a failure to perform a judicial duty of abating a nuisance. Dalton *v.* Wilson, 118 Ga. 100. And upon this principle it is held that if the nuisance is in or near a public street so as to endanger the safety of travelers thereon, a municipality will be liable for any special damage suffered by reason of the existence of the nuisance and the failure to abate the same. Dalton *v.* Wilson, *supra*; Parker *v.* Macon, 39 Ga. 725; Moore *v.* Townsend, 76 Minn. 64.

As the owner of property a municipality is amenable for its proper use. "The corporation of the city of New York has no more right to erect and maintain a nuisance on its lands than a private person possesses." Bower *v.* New York, 3 Barb. (N. Y.) 254, 258.

In this aspect of the case, sustaining the demurrer involves the incongruity, that if a city suffers a third party to operate a rock quarry in a negligent manner so near to one of its streets as to inflict injury upon a traveler thereon, it is liable in damages; yet, if it does the same act by its own servants, it is not liable. A course of reasoning which leads to such result can hardly be sound.

If the act were *ultra vires,* the underlying principle upon which the city would be liable is, that being charged with the duty to keep its streets in reasonably safe condition, it is estopped to set up the defense that the street was rendered unsafe by a nui-

sance of its own creation which it had no authority to maintain.

I am of opinion that the judgment ought to be affirmed. Reversed.

Note.

The Duncan and Donable cases, so much relied on in the majority opinion as controlling this case, undoubtedly must control, unless distinguishable on the facts from the principal case. Taking the more recent case first, it undoubtedly holds, rightly or wrongly, that operating a stone quarry **outside** the corporate limits is ultra vires a municipal corporation, where **such** power is not expressly conferred, and this though the object was to secure material for repairing streets. Duncan *v.* Lynchburg does not go even so far, as that was an action for damages for a nuisance created in connection with a quarry to secure stone for macadamizing county roads outside of the city, which it was specially authorized to do in conjunction with the county. But it was held, that, even if the right to operate the quarry was incident to the power so conferred, yet the city was expressly relieved from any liability for damages by the act giving the authority. Into neither of these cases does the question of the liability of the city for creating or allowing a nuisance in or near its streets enter at all.

All of the authorities cited by the court in the Donable case for its holding on the ultra vires question are cases applying the rule to operations without the corporate limits, and it seems regrettable that the court in the principal case should have extended the rule to a quarry operated within the city limits to obtain stone for the streets. The decided cases do not seem to require it, and it does seem to be a power reasonably necessary to the proper efficient and economical discharge of its positive and ministerial duties in reference to the streets, etc.

However that may be, it seems to us, with deference be it stated, that the decision here is wrong in its application of the rules as to liability for causing or not abating unsafe conditions in its streets; and as to liability for creating or not abating a public nuisance in or near such streets.

Taking up the former ground of liability first, it may be admitted that a mere noise outside the street limits, though amounting to a public nuisance, is not a defect in the street, and if due to an ultra vires operation, the city is not liable for injury to one using the street. But when we pass from a mere noise to a physical invasion of the street by projectiles hurled from outside the highway, as by a blast in a quarry as here, the case is different. The decided cases (leaving out Hubbell *v.* Viroqua, (67 Wis. 343, 30 N. W. 847), do not exonerate the city or town from liability. This is the only case cited by the court here to sustain its ruling on this point, and we will consider it later, with other cases applying a different rule.

Upon the question of liability for maintaining a nuisance causing injury to plaintiff while using the street in a proper manner, the court comments on there being no allegation of notice to the city of the unsafe condition of its street. Surely this was not necessary where the alleged dangerous condition was caused by the acts of the city's agents. The rule requiring notice to be alleged says that alleging **implied** notice is enough. Notice of the natural and probable consequences of one's own acts is surely implied in charging the acts themselves.

A breach of the positive and ministerial duty to keep the streets in a reasonably safe condition for travel, may make a city liable in damages, although directly due to an ultra vires act of its agents or employees. Richmond *v.* Smith, 101 Va. 161-70, 43 S. E. 345, is authority for this proposition where the city authorizes or allows a nuisance in a street.

The declaration here charges that the blast threw stones into the street, frightening the horse and striking and injuring plaintiff.

Although the mere sound of the blasting be not a nuisance per se, as seems to be held by the cases, is not this a projection of the blast itself into the street, and a physical invasion thereof, so as to make it a nuisance in the street? If an operation carried on near the street involves a physical invasion of the street by an object capable of causing injury to a passer-by, e. g. by a beam or pole, is it not a nuisance in the street? Such a pole or beam might be 75 feet long. A derrick beam, for example, operated in this quarry might have transported stone from quarry to street, and negligently injured a passer-by, invited to use the street and not warned of danger. Would this have been a nuisance in the street, or in the quarry?

Thus, with all deference, we cannot see that the cases dealing with the "question of a nuisance per se" (e. g. City of Richmond *v.* Smith), are not applicable to this case. This case and that of Wilson *v.* Phœnix Power Co., 40 W. Va. 413, 21 S. E. 1036, are said to be inapplicable for this reason. But is the principle not applicable to an operation of the city causing a nuisance or dangerous condition in the street by the way it is carried on?

Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, is cited to the point that the operation of this quarry was "a governmental, legislative and discretionary duty for which the city cannot be held liable," not a positive or ministerial duty. But that case declares the duty, the breach of which is charged here, i. e. to keep established streets reasonably safe, to be a ministerial and positive one. And it does seem that the creation by the city of a nuisance by its own acts, or the licensing of one, should be regarded in a different light from the failure to prevent or abate one. Then the rule in Richmond *v.* Smith applies and makes the city liable.

It is not claimed that it was a duty of any sort, but that its operation in such a manner as probably to cause injury to a person using the nearby street was a breach of the duty to keep the street in a reasonably safe condition, and not to create a nuisance therein.

The court then goes on to assume that the nuisance was in the rock quarry and says the city cannot be held liable therefor.

The bald facts in this case therefore are that the city, acting ultra vires if you will, did, as charged in the declaration, project stones into one of its streets by blasting on contiguous property in such a manner as to render the street dangerous to passers-by, and, so far as this demurrer is concerned, did not take steps to give warning of such danger, and did injure plaintiff, who was using the street in a proper and lawful manner. If this does not show a cause of action against the city, the ultra vires doctrine to the contrary notwithstanding, we are sadly mistaken in our view of this case. But we have the misfortune to differ with the court, and can only say that we take some comfort from the fact that the dissenting opinion, to which we now turn, agrees fully with what we have said above, both as to the implied right to operate a quarry such as this within the city, and as to the liability of the city even if it was ultra vires to do so. It is a little strange that the majority opinion pays no attention to the cases cited by Judge Whittle as supporting the doctrine of liability for failure to abate (and a fortiori for creating) a nuisance

in **or near** a public street. And they do support it, being not merely cases of nuisance per se **in** the streets.

City of Paris *v.* Com. (Ky.), 93 S. W. 907, is a case, so far as we can see, precisely in point, except that was a criminal prosecution for creating a nuisance, requiring stricter proof than in a civil action, and it was there charged that the blasting nuisance had gone on for months. The court said:

"When blasting is carried on in a city on a lot bounded by the streets of the city, and on which there is a row of houses, and it is done with large charges of powder, dynamite, and other explosives, throwing large pieces of stone high in the air, and causing them to fall beyond the limits of the lot, and on the streets of the city, and on the houses of citizens owning real estate in the neighborhood, jeopardizing the property, lives, and limbs of all such persons as well as the public in the streets of the city and the children in the public schoolyard near by, a public nuisance is undoubtedly committed." City of Paris *v.* Com. (Ky.), 93 S. W. 907, 908.

See Dalton *v.* Wilson, 118 Ga. 100, 44 S. E. 830, declaring municipality liable for failing to abate a nuisance in **or near** a public street, on ground that it must keep its streets reasonably safe. Citing Parker *v.* Macon, 39 Ga. 725, 99 Am. Dec. 486. Liability was denied in this case because nuisance was on private property and did not make street unsafe. See also, 28 Cyc. 1292, N. 38, citing as cases contra Howe *v.* New Orleans, 12 La. Ann. 481, and Hubbell *v.* Viroqua, supra.

The holding in Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712, is distinctly limited to cases of nuisance not created or maintained by the city, and not rendering its streets unsafe. The opinion is by Judge Cardwell.

The case of Hubbell *v.* Viroqua, 67 Wis. 343, 30 N. W. 847 (where bullet from a shooting gallery, licensed by the city on an adjacent lot, struck plaintiff passing along the street), seems clearly distinguishable from the principal case. Thus, there the liability under which it was sought to hold the city was for, "insufficiency or want of repairs" of the street in question, under a provision of the charter. Here it is the general duty to keep reasonably safe. But a clearer distinction is that the shooting gallery was not a nuisance per se, only when carelessly conducted, and no doubt if the city had been charged with knowledge of its being so conducted as to render the street unsafe, without correcting the abuse, or if it had so conducted the shooting gallery itself as to render the street unsafe, it would have been liable. Here the city was itself making the street unsafe by casting stones into it, a nuisance **per se**, and in the street itself.

It is intimated in the Viroqua case that the injury might have been charged in terms to make the city liable (see pp. 848-9 of N. W. Rep.). That case also denies liability for not abating the nuisance upon the express ground that it was not a nuisance per se, but because of the manner in which it was conducted, which was not authorized by the city, thus bearing out what we said above, (see p. 849 of S. W. Rep.). To quote exactly: "If the thing licensed could be carried on without becoming a public nuisance if carried on in a proper place and proper manner, the city is not liable for the consequence resulting from its being carried on in an improper manner or in an improper place. If the city can be made liable at all for the results of carrying on the business in an improper manner or in an improper place, the allegations of the complaint and the evidence must show affirmatively that the license granted authorized the licensee to carry on the business in the manner and at the place which

render it a public nuisance. A mere license to carry on the business generally within the city limits will not be construed to be a license to carry on the business in an improper place or in an improper manner. We cannot hold, as a question of law, that a shooting gallery erected in a proper place, and conducted in a proper manner, is a public nuisance. On the contrary, we are of the opinion that such a gallary is not a public nuisance at common law, and, in the absence of any statute declaring it to be such, it must be considered a lawful business when carried on in a proper manner and place. The mere granting of a license by the municipal authorities to carry on a shooting gallery within the corporate limits of the city was not, therefore, a license to keep and maintain a public nuisance within said limits, and the city is not chargeable for injuries resulting from an abuse of his license by the licensee." Hubbell *v.* Viroqua, 67 Wis. 343, 30 N. W. 847, 849.

If a city is liable for not abating a nuisance in or near a public street making the street unsafe, a fortiori should it be liable for creating such a nuisance through its agents and employees, whether acting ultra vires or no. City of Richmond *v.* Smith undoubtedly supports this. J. F. M.

WOOLFOLK *v.* GRAVES.

(Richmond, January 25, 1912.)

Appeal from Circuit Court of Spotsylvania county. Upon a rehearing. Affirmed.

Gordon & Gordon and *S. P. Powell,* for the appellants.

Carter & Carter, for the appellees.

PER CURIAM: A decree was rendered in this cause on the 12th day of January, 1911, which upon a petition to rehear was set aside. (For this opinion, see ante, p. 76.)

As said in the opinion disposing of the case on the former hearing, "the appellants set up their own title to the land in question in their answer, and made a fruitless effort to support it by evidence. They nowhere denied the trespasses committed and threatened by them, as charged in the bill, nor did they attempt to meet the charge of insolvency, fully sustained by the proof of appellees."

Upon a careful consideration of the case upon the rehearing, the conclusion is irresistible that appellants not only failed to make out a prima facie title to the land upon which the trespasses were committed and threatened, but their assertion of title is not bona fide; therefore they are not entitled, as has been so earnestly pressed in argument, to a trial of the issue by jury. Moorman & Hurt *v.* City of Lynchburg, just decided by this court.

For the reasons given and the authorities cited in this and in the opinion of this court filed at the former hearing of the case, the decree entered at that time is approved and will be adhered to. Affirmed.